

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

|                              |   |                         |
|------------------------------|---|-------------------------|
| <b>DAVID BEAVER</b>          | ) |                         |
| Claimant                     | ) |                         |
|                              | ) |                         |
| VS.                          | ) |                         |
|                              | ) |                         |
| <b>BROWN CARGO VAN, INC.</b> | ) |                         |
| Respondent                   | ) | Docket Nos. 1,039,849 & |
|                              | ) | 1,039,850               |
| AND                          | ) |                         |
|                              | ) |                         |
| <b>TRAVELERS INDEMNITY</b>   | ) |                         |
| Insurance Carrier            | ) |                         |

**ORDER**

Respondent requested review of the June 15, 2009 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on October 6, 2009.

**APPEARANCES**

Stephanie J. Wilson, of Lawrence, Kansas, appeared for the claimant. Katharine M. Collins, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agree that the only issue to be decided in this appeal is the ALJ's finding with respect to penalties pursuant to K.S.A. 44-512b and the computation of that penalty. The remaining issues addressed by the ALJ's Award are not in dispute and can be summarily affirmed.

ISSUES

At both the Prehearing Settlement Conference and the Regular Hearing the parties each agreed that the only issues to be determined at trial were the nature and extent of claimant's impairment and his entitlement to future medical treatment, including the unauthorized medical allowance.<sup>1</sup> After respondent submitted its brief in this matter, the ALJ, *sua sponte*, contacted both attorneys for the parties by telephone and advised them of his decision to award claimant penalties based upon K.S.A. 44-512b. An Award was then issued days later granting claimant, among other things, penalties in the sum of \$2,443.29. This reflects interest at the rate of 6.25 percent per annum from the date of claimant's accident (January 4, 2008) to the date of his Award, June 10, 2009.

Respondent appealed the ALJ's finding as to penalties asserting a number of arguments. Respondent first argues the ALJ erred in assessing penalties because claimant did not raise the issue on his own at either the Prehearing Settlement Conference or at the Regular Hearing much less did he make any sort of demand for penalties. The ALJ further erred when he brought the issue up *sua sponte* after respondent had submitted all its evidence, depriving respondent of any meaningful opportunity to address the issue. Finally, respondent takes issue with the ALJ's method of calculating the penalty as the ALJ commenced the penalty as of the date of claimant's accident.

Claimant urges the Board to affirm the ALJ's Award on all issues. Claimant maintains that he was not required to make any sort of demand for penalties under K.S.A. 44-512b, and the ALJ has inherent authority to unilaterally address and ultimately award penalties even when the evidence has closed and the issue was never addressed by the parties. Claimant also points to the fact that respondent failed to request an additional hearing or time to submit evidence on the issue of penalties in the parties' conference call with the ALJ. Finally, a strict construction of the pertinent statutes indicates that the ALJ was correct in assessing penalties commencing as of the date of accident as that was the date the compensation was "due". Accordingly, the Award should be affirmed in all respects.

The only issue before the Board on this appeal is whether claimant is entitled to receive an interest penalty under K.S.A. 44-512b for the alleged lack of just cause or excuse to pay benefits for the permanent partial general (work) disability that the ALJ found and the calculation of that penalty.

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<sup>1</sup> See the Prehearing Settlement stipulations sheet contained within the Court file as well as the Award, at p 2; see also both parties' submission letters to the ALJ.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

There is no dispute as to the underlying facts which have brought this matter to the Appeals Board. Claimant was injured in a work-related injury on January 4, 2008.<sup>2</sup> The parties could not come to an agreement regarding the nature and extent of his impairment. Accordingly, at the Prehearing Settlement Conference before the ALJ, held on November 18, 2008, an independent medical examiner was appointed. That physician, Dr. Joseph Huston, was asked to address physical impairment, work restrictions, task loss and the need for medical care. Unfortunately, Dr. Huston did not address task loss in his original report.

A regular hearing was held on January 26, 2009. When the hearing convened the ALJ obtained stipulations from the parties and narrowed the issues. As noted by the ALJ, the only issues to be decided by the court were “nature and extent of disability and future and unauthorized medical care.”<sup>3</sup> The ALJ inquired of the parties if there were any additions or modifications, to which they both indicated in the negative. The hearing proceeded and at no time was there an allegation on the part of claimant or the ALJ that penalties under K.S.A. 44-512b was an issue.

After the Regular Hearing, the parties entered into a stipulation as to claimant’s post-injury wages. Claimant had originally testified he was earning \$11 per hour and working approximately 10-30 hours per week.<sup>4</sup> Respondent learned that claimant was, in actuality, earning \$12 per week and thereafter, a stipulation was entered into evidence.<sup>5</sup> This stipulation reflects a post-injury actual wage of \$307.56 per week. Respondent nonetheless argued that claimant had the capacity to earn more in wages, thereby lessening the ultimate wage loss.<sup>6</sup>

On June 9, 2009, after the expiration of respondent’s terminal date the ALJ initiated a conference call “where he proceeded to advise the parties that there was an issue of interest penalties pursuant to K.S.A. 44-512b. At oral argument, the parties agreed that

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<sup>2</sup> Claimant docketed two separate claims that were consolidated for purposes of trial and a single date of accident was agreed upon at the Regular Hearing.

<sup>3</sup> R.H. Trans. at 5-6.

<sup>4</sup> *Id.* at 24-25.

<sup>5</sup> Stipulation on Current Wage attached to Respondent’s Submission Letter filed May 28, 2009.

<sup>6</sup> At the time this case was tried, this argument was legally viable. A claimant’s “good faith” efforts at finding appropriate post-injury employment was an issue to consider for purposes of a work disability under *Foult* and *Copeland*. Those cases were recently overruled and now only the actual post-injury wages are relevant to the computation of a claimant’s work disability. See *Bergstrom v. Spears Manufacturing Co.*, \_\_\_\_ Kan. \_\_\_\_, 214 P.3d 676 (2009),

during this telephone conference Judge Avery made it clear he had already *decided* to issue an award assessing an interest penalty against respondent. They likewise agree that the ALJ did not offer, nor did respondent request a hearing on this issue during the course of this conference. Finally, both counsel acknowledge the ALJ merely advised respondent's counsel that her client could avoid further interest penalty by paying the claimant although he did not set forth an amount that should be paid.

Six days after that, on June 15, 2009, Judge Avery issued an Award that, among other things, awarded claimant \$2,443.29 in interest penalties."<sup>7</sup> The ALJ's Award explained his decision as follows:

The respondent concedes claimant is entitled to work disability and argues claimant should be limited to a work disability award of \$51,526.90. The basis for the distinction between the Court's award and what respondent believed it owed the claimant was its argument the Court should impute a post injury wage based upon a 40 hour week, a theory *Nistler*, op cit.[<sup>8</sup>] clearly rejects. Regardless of the total amount, there was no dispute to claimant's entitlement to work disability payments for at least a period encompassing the date of injury to the date of this award. The Court finds there was not just cause or excuse for the failure of the respondent to begin paying permanent partial disability payments prior to the Award.<sup>9</sup>

The ALJ then went on to calculate the Award:

As of June 10, 2009 permanent partial disability payments were due for 74.71 weeks in the amount of \$27,282.60. Interest is assessed at the rate of 6.25 percent per annum, per K.S.A. 16-204 or \$4.67 per day or \$2,443.29 as of June 10, 2009 and shall continue to accrue at the daily rate until due and owing amounts are paid to the claimant.<sup>10</sup>

The Workers Compensation Act provides that an injured worker is entitled to receive an interest penalty when an employer or its insurance carrier without just cause or excuse fails, before an award, to pay compensation. K.S.A. 44-512b provides:

(a) Whenever the administrative law judge or board finds, **upon a hearing** conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or

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<sup>7</sup> Respondent's Brief at 2 (filed July 22, 2009). Claimant takes no issue with this recitation of the facts. Claimant's Brief at 1 (filed Aug. 7, 2009).

<sup>8</sup> *Nistler v. Footlocker Retail, Inc.*, 40 Kan. App. 2d 831, 196 P.3d 395 (2008).

<sup>9</sup> ALJ Award (June 15, 2009) at 3-4.

<sup>10</sup> *Id* at 4.

excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

The statute requires a hearing to be conducted pursuant to K.S.A. 44-523. Quite clearly there was no such hearing. This case was submitted and on his own the ALJ decided that an interest penalty was warranted. He then initiated a telephone call with the parties *and told them of his intention to award interest penalties against respondent*. This procedure flies in the face of the language contained within the statute as well as the fundamental principles of due process. While there was a hearing on January 26, 2009, that hearing did not address the issue of interest penalties under K.S.A. 44-512b. Thus, respondent offered no evidence on that issue. Once the claim was submitted to the ALJ, he brought the issue before the lawyers suggesting that he had decided to impose penalties. In essence, the ALJ decided an issue that was not itemized at the Regular Hearing and was not addressed by either party in their briefs to the ALJ. This procedure cannot be condoned and as a result, the penalties assessed by the ALJ must be reversed and set aside.

The ALJ's decision to award claimant pre-award interest penalties should be reversed and set aside, with the balance of the Award being affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 15, 2009, is affirmed in part and reversed and set aside in part as set forth above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stephanie J. Wilson, Attorney for Claimant  
Katharine M. Collins, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge